Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

ALSHAFI TATE,

Petitioner,

v.

EXECUTIVE MANAGEMENT SERVICES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seventh Circuit reversed the district court's decision denying Executive Management Services, Inc.'s, renewed Rule 50(b) motion for judgment as a matter of law, ruling that Alshafi Tate did not engage in protective conduct when he rebuffed his supervisor's sexual ultimatums (continue having sex with her or lose his job), reasoning that Tate failed to produce evidence that he believed that the supervisor's actions he opposed violated Title VII (an issue that was never preserved, litigated or briefed in the district court or Seventh Circuit).

Two questions are presented:

1. Does an employee who rejects his supervisor's sexual demands engage in protected oppositional conduct under Title VII, or must the employee also offer proof of his subjective belief that the conduct being opposed is unlawful.

2. May an appellate court decide *sua sponte* a case-determinative issue not preserved, raised, or briefed by the parties, particularly when the issue involved a mixed question of fact and law, the prejudiced party had no notice or opportunity to present his position, and the benefitted party failed to preserve the issue in the proceedings below.

PARTIES

The parties to this action are set forth in the caption.

An interested party, not named in the caption, is Mark A. Warsco, as trustee in bankruptcy for Alshafi Tate. The Trustee's motion to intervene as a party plaintiff was granted by the district court on February 22, 2006.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alshafi Tate respectfully prays that this Court will grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on October 10, 2008.

OPINIONS BELOW

The October 10, 2008, opinion of the court of appeals is reported at 546 F.3d 528 (7th Cir. 2008) and is set out at pp. 1a-10a of the Appendix. The June 4, 2007, opinion of the district court denying Respondent's second motion for judgment as a matter of law is not officially reported but is set out at pp. 11a-21a of the Appendix. The October 12, 2006, opinion of the district court denying Respondent's initial Rule 50 motion is not officially reported but is set out at pp. 22a-28a of the Appendix. The May 12, 2006, opinion and order of the district court denying Respondent's motion for summary judgment is not officially reported but is set out at pp. 29a-40a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on October 10, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . ..

STATEMENT OF THE CASE

One question presented in this case is whether an employee who rejects his supervisor's continued demands for sex, and who was terminated immediately after refusing the sexual ultimatum, must also show that he reasonably and subjectively believed in good faith that the conduct which he opposed was unlawful under Title VII, in order to prove that he engaged in protected conduct under Title VII. The second question presented is whether a case-changing issue may be considered *sua sponte* by a court of appeals when the issue was not preserved by respondent and was otherwise never raised, briefed, or argued by the parties, particularly when that issue involves a mixed question of law and fact, and petitioner had no notice or opportunity to present his position on the issue.

Alshafi Tate ("Tate") worked as a janitor for Executive Management Services, Inc., ("EMS"). Dawn Burban was Tate's supervisor who had the power to recommend promotions and raises, but not the ultimate authority to hire or fire Tate.[1] Almost

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[1] Burban was not a supervisor with ultimate terminating authority, so Tate had no *quid pro quo* sexual harassment claim. He relied upon the cat's paw theory of liability to impose responsibility upon EMS. In the Seventh Circuit, the term "supervisor" means a person having the authority to hire and fire.

immediately, Tate and Burban began having sex, and within one week of his start date, Tate was promoted and received a pay raise. Burban initiated the sex which happened two or three times per week, sometimes at work and other times at the home of a co-worker.

After Tate married his fiancee, Burban threatened Tate about his job and that she was going to tell his wife. Several weeks before Tate's termination on January 13/14, 2004, Tate told Burban that he "wasn't messing with her anymore . . ." and she gave him an ultimatum, a "couple days to think about it." (App. 3a). Tate stated that he was not going to continue "messing" with Burban. Burban gave Tate the ultimatum again (continue the sexual relationship or be fired), and she asked Tate if he had made a choice yet. The second ultimatum happened at work when Burban summoned Tate to her office and asked if he had made a decision about the ultimatum. Knowing exactly what she was talking about, Tate told her "no." The choice he had to make was either losing his job or staying involved with her (Burban). When Burban asked Tate for his answer, he replied, "I'm not dealing with you anymore. . . ." She replied that she could have him fired at any given time. When Tate told her

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Phelan v. Cook County, 463 F.3d 773, 783 (7th Cir. 2006). Thus Burban's harassment of Tate did not impose strict liability pursuant to *Faragher v. City of Raton*, 524 U.S. 775, 807-08, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). See also *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004) ("Supervisor" is a legal term of art for Title VII purposes, and an employee merely having authority to oversee aspects of another employee's job performance does not qualify as a supervisor in the Title VII context).

"no," Burban raised her voice and stated, "You don't know who [you're] fucking with!" Burban told Tate that she was going to have him fired. In response to Tate telling Burban that he wasn't "messing with her anymore," Burban responded by saying "you don't know who you're fucking with, get the fuck out of the building, get your ass out of the building, you just fucked up." He was terminated before having an opportunity to explain his side of the story.

EMS moved for summary judgment claiming that Tate could not maintain a claim for retaliation "because he never opposed any conduct unlawful by Title VII prior to his discharge." (App. 33a). EMS claimed that even if an employee's act of ending a relationship constituted an expression against sexual harassment, the ending of a voluntary consensual sexual relationship did not constitute oppositional conduct made unlawful under Title VII. (App. 34a). The district court denied the motion for summary judgment. (App. 40a). At no time during the summary judgment proceedings did EMS question Tate's good faith reasonable belief in the unlawfulness of Burban's sexual demands; nor did the district court make any ruling or comment on the issue.

The case proceeded to trial. The jury returned its verdict on September 28, 2006, determining that plaintiff failed to prove his sexual harassment claim but finding EMS liable for retaliation. (App. 23a). The district court denied EMS' Rule 50 motion for judgment as a mater of law on October 12, 2006. (App. 22a). The district court determined the relevant facts pertinent to the motion as follows:

> At trial, the Plaintiff testified that he had consented to a sexual relationship with his supervisor, Dawn Burban. After he attempted to end the relationship, Burban gave him an ultimatum: he would have to choose between his wife and his job. He took this to mean that if he ended the sexual relationship with Burban, he would lose his job. When she confronted him and asked for his answer, he told Burban he "wasn't messin' with her anymore." Burban responded by cursing and yelling at the Plaintiff, telling him to leave the building and that he would lose his job.

(App. 24a). The district court concluded that there was sufficient justification to hold EMS liable under the "cat's paw" theory of liability, pursuant to *Byrd v. The Illinois Department of Health*, 423 F.3d 696 (7th Cir. 2005). As to the issue, "Whether the Plaintiff Opposed an Unlawful Employment Practice," the district court observed that EMS had made this same argument in its motion for summary judgment, and again, the court overruled it. (App. 27a). Noteworthy is that EMS never argued, as grounds for its Rule 50 motion, that Tate failed to present evidence that he reasonably believed in good faith the practice he opposed violated Title VII, nor did the district court make a ruling in that regard. (App. 22a-28a).

EMS filed a second motion for judgment as a matter of law, and presented the same argument – "that the Plaintiff did not oppose conduct made unlawful by Title VII . . . ." (App. 12a). EMS did not, in its post-verdict motion for judgment as a matter of law, make any claim or argument that Tate failed to present evidence that he believed that Burban's

actions were unlawful. (App. 11a-21a). In denying the motion, the court stated:

> A straightforward reading of the statute's text requires finding that rebuffing sexual harassment can in some situations be considered opposition to an unlawful employment practice. The applicable subsection states, "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice." 42 U.S.C. § 2000e-3(a). It is an unlawful employment practice to threaten a person with termination if he or she refuses to continue in a sexual relationship. *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226 n.7 (7th Cir. 1997) ("[H]arassment, occurs when the receipt of benefits of the maintenance of the status quo is conditioned on acquiescence to sexual advances."). When an employee is given an ultimatum that continued employment depends on continuing a sexual relationship, and the employee says "no more," that employee could reasonably be understood to be opposing continuing the sexual relationship and to be opposing a change in the terms of his employment. As the Plaintiff notes in his brief, "Tate" not only refused Burban's ultimatum to have sex, he did so under the express threat of termination by Burban." (Pl. Br. 5, DE 107.). When the protesting employee is terminated, the termination could be motived by the opposition to the change in employment terms, the opposition to the sexual relationship, or

> both. The retaliation claim intertwines with the harassment claim, but they are not identical.

(App. 13a-14a). The court of appeals reversed. "Because Tate has not shown that he engaged in protected conduct, we reversed the district court's decision." (App. 2a). The Seventh Circuit noted that "there is a circuit split about whether a person who rejects a supervisor's sexual advances has engaged in a 'protected activity'. *Compare LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 389 (5th Cir. 2007) (holding that single, express rejection of sexual advances does not constitute 'protected activities' for purposes of a retaliation claim") *with Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (finding that when the plaintiff told her supervisor to stop harassing her, she engaged in the most "basic form of protective conduct"). (App. 8a).

The Seventh Circuit dodged the issue presented and decided the case *sua sponte* on an issue that was not preserved or briefed: "Tate has not shown that he reasonably believed in good faith the practice [he] opposed violated Title VII." (Internal quotes omitted). (App. 8a). The Seventh Circuit reasoned:

> There is simply no evidence in the record that Tate believed that Burban's actions were unlawful. In fact, the only statement that Tate made to Burban was that they "were not good with each other" and that he "was not messing with her anymore" statements which do not indicate that Tate believed he was being sexually harassed. . . . All of these statements point to personal reasons for ending the

> relationship rather than concerns about the legality of Burban's behavior.

(App. 8a-9a). The court of appeals stated that, "Title VII was designed to protect the rights of employees *who in good faith protest the discrimination they belief they have suffered* and to ensure that such employees remain free from reprisals of retaliatory conduct." (App. 9a-10a, quoting *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004)). The court of appeals determined that, "the record is devoid of any statements that indicate sexual harassment was at issue. Because Tate has failed to establish that he had a good faith belief that he was being sexually harassed, EMS is entitled to judgment as a matter of law." (App. 10a).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER COURTS OF APPEALS AND THE UNITED STATES SUPREME COURT

Certiorari is warranted to resolve the circuit split of whether an employee who rejects a supervisor's sexual advances has engaged in a protected activity. (App. 8a). *Compare LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 389 (5th Cir. 2007) (holding that a single, express rejection of sexual advances does not constitute "protected activity" for purposes of a retaliation claim) *with Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (finding that when the plaintiff told her supervisor to stop harassing her, she engaged in the most "basic form of protected conduct") *with Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir.

1988) ("[An employee's] alleged resistance to [a supervisor's] advances only qualifies as protected activity if [the supervisors's] advances actually occurred and were an 'unlawful employment practice' under Title VII."). This issue was squarely addressed by the district court in its' decision denying summary judgment. (App. 33a-40a). The issue was squarely addressed again by the district court when ruling on EMS' initial Rule 50(a) motion for judgment as a matter of law, wherein the court referenced its' earlier May 12, 2006, Opinion regarding summary judgment. (App. 27a-28a). Finally, the district court rejected, for a third time, EMS' argument that Tate did not oppose an unlawful employment practice. (App. 13a-15a). The district court rulings, consistent with the Eighth Circuit's holding in *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000), is the view more in keeping with the purposes of Title VII.

The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986). This Court in *Meritor Savings Bank* held that the fact that sex-related conduct was "voluntary" was not a defense to a sexual harassment claim brought under Title VII, because the gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 477 U.S. at 68. In the workplace, relationships change – a once-consensual, once-welcome relationship may turn into one that is non-consensual and unwelcome. The policy of preventing discrimination and harassment in the workplace can only be fulfilled if employees are afforded relief for opposing and resisting unlawful employment practices, particularly if an employee is terminated on the heels of engaging in such protected activity. Tate's rejection

of his supervisor's demands for sex under threat of termination was protected activity for purposes of sustaining a retaliation claim under Title VII.

The Seventh Circuit's rather circumspect analysis of Tate's retaliation claim violates Supreme Court precedent. In *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), this Court stated the broad objectives of Title VII's anti-retaliation provision:

> The anti-retaliation provision seeks to secure that primary objective [a workplace where individuals are not discriminated against because of their . . . gender-based status] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct.

548 U.S. at 63. The Court encouraged a broad reading of Title VII's opposition clause, "Interpreting the anti-retaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends." 548 U.S. at 67. The Court also noted that, "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id.* at 69. The Seventh Circuit's decision violated the analytical framework enunciated by this Court in *Burlington Northern*. The court of

appeals failed to credit the facts and favorable inferences therefrom determined by the jury, i.e., that Tate had refused Burban's initial sexual ultimatum approximately two weeks before his termination, that after he was summoned to Burban's office and made to answer her second sexual ultimatum, he said, "No," that his choice was his wife and his job, not Burban, and that he wasn't going to be "messin' with her anymore" – *meaning that he opposed her sexual ultimatums and declined her demands for sex in the future.*

The Seventh Circuit's decision also violates this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), i.e., that in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record and "must draw all reasonable inferences in favor of the non-moving party." *Id.* at 150. A court of appeals must not disregard critical evidence favorable to the non-moving party. *Id.* at 152. But the Seventh Circuit's decision (reversing the district court's decision denying EMS' Rule 50 motion) disregarded the evidence in favor of Tate. As summarized by the district court, "The relevant facts presented in the motion for summary judgment differ little from what was presented at trial":

> At trial, the Plaintiff testified that he had consented to a sexual relationship with his supervisor, Dawn Burban. After he attempted to end the relationship, Burban gave him an ultimatum: he would have to choose between his wife and his job. He took this to mean that if he ended the sexual relationship with Burban, he would lose his job. When she confronted him

> and asked for his answer, he told Burban he "wasn't messin' with her anymore." Burban responded by cursing and yelling at the Plaintiff telling him to leave the building and that he would lose his job.
>
> Burban called her supervisors and told them the Plaintiff was insubordinate because he refused a work assignment. Burban filled out the termination form for the Plaintiff and the Plaintiff received a call the next day that he was terminated from his position. The Defendant's purported decision maker testified at trial that she took Burban's statements into account when deciding whether to terminate the Plaintiff.

(App. 24a-25a). The Seventh Circuit disregarded all of this evidence and the inferences therefrom which demonstrates Tate's belief in the wrongfulness of Burban's conduct, thus violating *Reeves*.

The Seventh Circuit's decision conflates the distinction between an employment practice that is patently and actually made unlawful by Title VII, with an employment practice that the employee could reasonably belief is unlawful. The United States Supreme Court has recognized the difference between the two types of practices. See *Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001). The question is whether an employee opposing a practice that is actually made unlawful by Title VII (rejecting the sexual demands/ultimatums of the supervisor under threat of discharge), must also show proof that he reasonably *believed* that the practice was unlawful. In *Clark County*, the Supreme Court rejected a retaliation claim where, "[n]o reasonable person could

have believed that" the underlying incident complained about "violated Title VII's standard" for unlawful discrimination – sexual orientation was not within Title VII's purview. 532 U.S. at 271. The Seventh Circuit went too far in requiring that an employee show a belief in the unlawfulness of the activity opposed when the employee is opposing a patently unlawful employment practice (in this case, rejecting a supervisor's demands for sex under threat of termination), not just a practice reasonably believed to be unlawful. Certiorari is needed to address this question.

The Seventh Circuit's decision that Tate had to show evidence that he subjectively believed that Burban's actions were unlawful is at odds with the objective, reasonable employee approach taken by the Supreme Court in *Burlington Northern*, 548 U.S. at 68. The question should not be whether Tate *subjectively* believed in the unlawfulness of Burban's actions – or whether Tate articulated that subjective belief. Common sense dictates that Tate believed that Burban's demands for sex were wrong, because he opposed them, and did so under threat of termination. At least one circuit court of appeal has recognized the difference between an actual unlawful employment practice and one that an employee merely reasonably believes to be unlawful. In *Jordan v. Alternative Resources Corp.*, 458 F.3d 332 (4th Cir. 2006), the Fourth Circuit was presented with an employee who contended that the reporting of one incident of race harassment was opposition to an unlawful hostile work environment. *Id.* at 336. After examining the plain language of Title VII, 42 U.S.C. § 2000e-3(a), the court stated, "The plain meaning of the statutory language provides protection of an employee's

opposition activity when the employee responds to an actual unlawful employment practice. . . . ." *Id.* at 338. The court also stated that whether the employee reasonably believes a practice is unlawful is an objective one. *Id.* at 339.

Certiorari is warranted to reconcile the Seventh Circuit's decision with the approach taken by the Fourth Circuit. The Seventh Circuit ignored the plain meaning of the statute when analyzing Tate's opposition activity, i.e. objecting to the actual unlawful employment practice of Burban's demands for sex in return for Tate keeping his job. Another critical difference is that the Fourth Circuit employed an objective analysis in determining whether the employee reasonably believed the practice to be unlawful. *Id.* at 339. But the Seventh Circuit looked at what Tate *subjectively* believed, not what he *reasonably* believed and not the context of his oppositional words and conduct. "There is simply no evidence . . . that Tate believed that Burban's actions were unlawful." (App. 8a). "[T]he problem is that he did not necessarily believe that her behavior was illegal at the time." (App. 9a). But the *objective* facts and reasonable inferences therefrom supported a finding that Tate was engaged in protected activity – he refused Burban's sexual ultimatum two weeks earlier, he was summoned to her office on January 13, 2006, and refused her sexual ultimatum again, and the refusal of her sexual demands caused him to be terminated immediately, which caused him to file a charge of discrimination with the EEOC, hire a lawyer, and then sue EMS. Of course Tate reasonably believed that Burban's actions were unlawful; otherwise he would not have gone to the lengths he did to obtain redress. The point is that the Seventh Circuit's

decision conflated the two types of unlawful employment practices – one that is actually unlawful with one that an employee merely reasonably believes to be unlawful. The Seventh Circuit lumped the two together and applied a subjective belief component which is neither required by the text of section 704(a) or by the Supreme Court or other courts of appeal. Certiorari is warranted.

II. PETITIONER REQUESTS THIS COURT TO HOLD THIS CASE PENDING ITS DECISION IN *CRAWFORD v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE*

Currently under review by this Court is *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 06-1595 (argued 10/08/08). The employee in *Crawford* strongly objected to the sexual overtures of her supervisor, telling him on one occasion to "get the hell out of my office." Brief of Petitioner, *Crawford* (No. 06-1595) p. 3. Crawford argued that her conduct was protected by the opposition clause of section 704(a). *Id.* pp. 40-52. Petitioner Tate urges this Court to hold this case pending its decision in *Crawford* given the factual and legal similarities, i.e., whether the oppositional activity of rejecting the supervisor's conduct is protected by the opposition clause of Title VII.

III. THIS CASE PRESENTS AN ISSUE CRITICAL TO THE PROTECTION OF EMPLOYEES WHO REJECT THEIR SUPERVISORS' DEMANDS FOR SEX AND OPPOSE PATENTLY UNLAWFUL EMPLOYMENT PRACTICES UNDER TITLE VII

The Seventh Circuit held that the anti-retaliation provisions in section 704(a) of Title VII do not protect an employee who rejects supervisor's demands for sex in the future when the employee fails to show evidence of his belief. Specifically, the court of appeals held that, "Because Tate has failed to establish that he has a good faith belief that he was being sexually harassed, EMS is entitled to judgment as a matter of law." (App. 10a).[2]

Title VII's anti-retaliation provision is clear: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). The plain text of Section 704(a) of Title VII does not require that an employee state, or

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[2] Whether this holding violates the long-settled rule that appellate courts will not consider an issue neither pressed nor passed upon below is addressed in "Section IV" herein. Nevertheless, Petitioner is compelled to point out that "Tate's reasonable belief in the unlawfulness of Burban's behavior," or "Tate's belief that he was being sexually harassed," were issues never addressed in the proceedings below – not at summary judgment, not in EMS' pre-verdict Rule 50(a) motion, not in EMS' post-verdict Rule 50(b) renewed motion, and not in the briefs filed by the parties in the court of appeals.

otherwise show, that he has a good faith belief that the practice that he was opposing was unlawful, particularly when the employee opposes a patently unlawful employment practice. Tate (a man) refused to have sex with Burban, i.e., he refused her continued sexual demands, which she made a condition in return for his continued employment. Burban (a woman) made sexual demands upon Tate (a man) because of his sex. Applying a textual analysis, Tate was opposing a practice (Burban's demands for sex), patently an unlawful employment practice under Title VII. (See 42 U.S.C. § 2000e-2(a), "it shall be an unlawful employment practice for an employer - (1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."). The Seventh Circuit's decision requiring a showing of "belief" in addition to oppositional conduct violates the plain text of section 704(a).

The Seventh Circuit's decision impinges upon the EEOC's broad view of oppositional conduct: "Because individuals often may not know the specific requirements of the anti-discrimination laws enforced by the EEOC, they may make broad or ambiguous complaints of unfair treatment. Such a protest is protected opposition if the complaint would reasonably have been interpreted as opposition to employment discrimination." EEOC Comp. Man., Section 915.003, Part 8 II(B)(2). Furthermore, the "refusal to obey an order also constitutes protected opposition if the individual reasonably believes that the order makes discrimination a term or condition of employment. . . . ." *Id.* That "sexual harassment" is an unlawful employment practice is codified at 29 C.F.R. § 1604.11:

> (a) Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

An employee's action or statement constitutes opposition if it "would reasonably [be] interpreted as opposition." EEOC Comp. Man. § 8-II(B)(2). Certiorari is warranted as the Seventh Circuit's decision interferes with an employee's right to oppose unlawful conduct by demanding more (proof of belief) than is required by the Act or the EEOC which administers Title VII.

This Court has recognized the importance of "a broad interpretation of the anti-retaliation provision [in Title VII]." *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2413 (2006). "[I]nterpreting the anti-retaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends." 548 U.S. at 67. The Seventh Circuit's decision runs afoul of this Court's interpretive rules and guidelines in assessing oppositional conduct. Review is warranted.

There is no textual limitation as to whom an employee must address under the opposition clause. The opposition clause covers conduct such as "complaining to anyone . . . about allegedly unlawful practices, refusing to obey an order because the worker thinks it is unlawful under Title VII, and opposing unlawful acts by persons other than the employer . . . ." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000). There is no exclusion involving the harasser, herself, i.e., an employee who voices opposition directly to the harasser engages in protected conduct. See *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (an employee "engaged in the most basic form of protective activity when she told her supervisor . . . to stop his offensive conduct"); *Reed v. Cracker Barrel Old County Store, Inc.*, 133 F.Supp. 2d 1055, 1070 (M.D.Tenn. 1000) (an employee who complained to her direct and harassing supervisor, and also to two other managers, engaged in protected conduct when she told her supervisor to stop sexually harassing her); *Moore v. City of Philadelphia*, 461 F.3d 331, 343 (3rd Cir. 2006) (employees had opposed unlawful discrimination by expressing their criticism to their supervisor and up the chain of command). The Seventh Circuit's decision diminishes an employee's right to directly oppose a harassing supervisor's conduct. Certiorari is warranted.

Indeed, the dictionary definition of "oppose" includes "to place opposite or against something (as to provide resistance or contrast)," or "to strive against: RESIST." See Merriam-Webster Dictionary, p. 492 (1974 G. & C. Merriam Co.). The Seventh Circuit's decision weakens an employee's ability to oppose a sexual harasser's patently unlawful conduct by adding a layer of "actual belief," which is not required by the

statute. Stated differently, the text of Title VII's anti-retaliation provision does not require proof of actual belief; it only requires oppositional speech or conduct to an unlawful practice. An employee who is immediately terminated, as was Tate, has certainly sent a message that the conduct he opposed was wrongful. Otherwise, why would the harasser retaliate by terminating the employee. The Seventh's Circuit's holding to the contrary thwarts the remedial purpose of Title VII – to allow an aggrieved employee redress.

The holding of the court of appeals vitiates the ability of employees who oppose unlawful employment practices to seek redress for the effects of retaliation under Title VII. Many employees, whether because they are poorly educated, mentally infirm, or for any other reason inarticulate, will not be able to express or have any view about whether the discrimination they are experiencing violates Title VII. As stated by the Petitioner in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 06-1595, Brief For The Petitioner, p. 40, "The protected employee need not express or have any view about whether the discrimination violates Title VII, or even know that Title VII exists."

The Seventh Circuit's decision is directly contrary to this view. The Seventh Circuit's finding Tate presented no evidence that he believed Burban's actions were unlawful, (App. A-8a), conflicts with this Court's decision in *Burlington*, 548 U.S. at 69, 126 S.Ct. at 2405, wherein the Court stated that, ". . . the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." The court in *Burlington Northern* quoted

from its prior decision in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81-82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), "The real social impact of work place behavior often depends on a constellation of surrounding circumstances, expectations, and relationships. . . ." The Seventh Circuit's decision failed to account for the context and dynamics of the Burban-Tate relationship. Burban kept demanding sex. Tate adamantly refused. And, when the "no" and the "I ain't messin' with you" finally sunk in, Burban immediately forced Tate to leave the premises and orchestrated his termination. Reasonable fact-finders could, and did, determine that Tate engaged in protected activity and was terminated for it. The Seventh Circuit's ruling (and reasoning) to the contrary defeats the anti-retaliation purposes of Title VII. "Title VII depends for its enforcement upon the cooperation of employees who are willing to" oppose unlawful employment practices in the workplace. See *Burlington N. & Santa Fe Rwy. Co. v. White*, 126 S.Ct. 2405, 2414 (2006).

The Seventh Circuit's decision undercuts the utility of Title VII's anti-retaliation provision by suggesting, if not outright declaring, that if an employee has "personal reasons" for opposing the unlawful employment practice, then the employee forfeits the ability to utilize Title VII to obtain redress for an adverse action brought about by his oppositional behavior. (App. A-9a). Sex is always "personal." There may be dozens, if not hundreds, of reasons why a person may not want to have sex with, or wants to discontinue having sex with, another person. But the "personal reasons" for opposing sexual demands by a supervisor do not make the employee's oppositional conduct unprotected. But that is exactly the effect of

the Seventh Circuit's ruling. Section 704(a) does not require that an employee forego the personal reasons that may underlie his refusal of conceding to sexual demands of a particular supervisor, just as section 704(a) does not mandate that the employee express his concerns about the legality of the supervisor's behavior. While personal reasons may serve as the foundation for oppositional conduct, it is the employee's expression of that oppositional conduct – either by words or actions -- that must be protected regardless of the personal reasons which motivated the opposition. If the employee is terminated for engaging in that protected conduct, if he gets fired for refusing sexual demands of the supervisor, then the employee has been terminated for engaging in protected activity, regardless of the enumerable personal reasons for engaging in the oppositional conduct. See *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), a "mixed speech" case where despite personal interests underlying the speech, it touched upon a matter of public concern and was deemed protected. See also *Spiegla v. Hull*, 371 F.3d 928, 939 (7th Cir. 2004) (mere personal motivation does not override the important content of employee's protected speech).

The Seventh Circuit's decision requiring Tate to show evidence of his subjective belief that Burban's conduct violated Title VII conflicts with the Third Circuit. However brief and nondescript his oppositional language and conduct, it is clear that Burban got the message, because she had Tate fired immediately after he spurned her advances. In *Curay-Kramer v. Ursuline Academy, Wilmington*, 450 F.3d 130 (3rd Cir. 2006), the court determined that the employee's subjective belief was irrelevant in determining whether she engaged in protected conduct

– "[I]t is the objective message conveyed, not the subjective intent of the person sending the message, that is determinative." *Id.* at 137. "When deciding whether a plaintiff has engaged in opposition conduct, we look to the message being conveyed rather than the means of conveyance." *Id.* at 135. Burban got the message – Tate no longer wanted sex, he opposed Burban's demands for it, and he was fired because of his opposition. The Seventh Circuit's decision conflicts with the analysis employed by the Third Circuit. Thus, certiorari is warranted.

IV. THE SEVENTH CIRCUIT'S *SUA SPONTE* CONSIDERATION OF A CASE-CHANGING ISSUE (TATE'S BELIEF IN THE ILLEGALITY OF BURBAN'S SEXUAL DEMANDS), VIOLATES THE LONG-SETTLED RULE THAT APPELLATE COURTS WILL NOT CONSIDER AN ISSUE NEITHER PRESSED NOR PASSED UPON BELOW

It is a long-settled rule that appellate courts will not consider an issue either pressed nor passed upon below. See *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). As the Supreme Court has explained, this rule of appellate procedure is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). The Seventh Circuit's decision

is an abuse of discretion. Certiorari is warranted to establish the discretionary limits of a court of appeals deciding *sua sponte* a case-altering issue.

At no time during the litigation and briefing in the proceedings below did Respondent raise and preserve the issue upon which the court of appeals decision turned, i.e., Tate's alleged failure to show that he reasonably believed in good faith and subjectively believed that Burban's actions were unlawful and in violation of Title VII. The issue was not raised in the motion for summary judgment, nor did the district court make a ruling on the unpreserved issue. (App. D-9a-40a). The issue was not raised in the Rule 50(a) motion, nor was it addressed by the district court. (App. C-22a-28a). The issue was never raised in Respondent's Rule 50(b) post-verdict motion for judgment as a matter of law, nor did the district court rule on the unpreserved issue. (App. B 11a-21a). And yet, this pivotal issue was the cornerstone for the Seventh Circuit's decision. (App. 8a-10a).

Petitioner recognizes that the rule prohibiting an appellate court from considering an issue not passed on nor pressed below is subject to certain limited exceptions. An appellate court may resolve an issue not decided by the district court where the proper resolution is beyond any doubt. *Singleton*, 428 U.S. at 121. And appellate courts are afforded much discretion in determining what questions may be taken up and resolved for the first time on appeal. *Id.* at 120. However, the Supreme Court has recognized that, before acting on its' own initiative [*sua sponte*], a court must accord the parties fair notice and an opportunity to present their positions. *Day v. McDonough*, 547 U.S. 198, 210 (2006).

Certiorari is warranted to determine the bottom limit to the discretion of the courts of appeals to raise *sua sponte* an argument not advanced by a party either before the district court or on appeal, and then to advocate a particular position and resolve the appeal based on that advocacy. The prejudice to Petitioner is extreme and obvious. The Supreme Court has recently indicated that it would take up the claim that a court of appeals has exceeded its discretion "if the case turned on the propriety of the Circuit's decision to reach the [dispositive] issue. . . ." *Exxon Shipping Co. v. Baker*, No. 07-219, 128 S.Ct. 2605 (U.S. 6-25-08).

It was no small thing, the creation of an issue never litigated below but made-up and advocated by the court of appeals. The particular argument created and advanced by the court of appeals was *never* litigated below, i.e., Tate's reasonable good faith and subjective belief that Burban's conduct violated Title VII. It was never argued in summary judgment and never made an element of Tate's burden of proof, and never included as an element in the jury instructions (which went unopposed and to which no objection was made). As a result there was no "channeled" evidence directly meeting this "belief" element. The prejudice to Petitioner cannot be overlooked.

More specifically, the ruling appealed by Respondent was the Rule 50(a) motion for judgment as a matter of law and the renewed Rule 50(b) motion. Neither the Rule 50(a) nor the Rule 50(b) motion focused upon Tate's reasonable good faith belief in the wrongfulness or illegality of Burban's actions. "The Defendant presents the same two arguments in its second motion for judgment as a matter of law as it did in its first motion: first, that the Plaintiff did not

oppose conduct made unlawful by Title VII, and second, that the Defendant performed an independent investigation adequate to prevent it from being liable for its employee's retaliatory motive. . . .." (App. 12a). "The Defendant argues the Plaintiff did not oppose an unlawful employment practice, and so, the Plaintiff's retaliation claim must be dismissed." (App. 27a). And in the motion for summary judgment, EMS argued that Tate could not maintain a claim for retaliation "because he never opposed any conduct made unlawful by Title VII prior to his discharge." (App. 33a). Unquestionably, EMS never grounded any of its Rule 50 motions upon Tate's lack of proof of his reasonable good faith subjective belief that Burban's sexual demands were related to Title VII.

The Court has declared that a "failure to comply with Rule 50(b) forecloses [a party's] challenge to the sufficiency of the evidence." *Unitherm Food Sys., Inc., v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404, 407 (2006). "[T]he precise subject matter of a party's Rule 50(a) motion - namely, its entitlement to judgment as a matter of law - cannot be appealed unless that motion is renewed pursuant to Rule 50(b)." *Id.* at 404.

Appellate courts have "repeatedly stated that a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory." *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993). The usual exception to this general rule is when issues are raised for the first time on appeal and involve questions of law, the proper resolution of which is beyond reasonable doubt and the failure to address the issues would resolve in a miscarriage of justice. *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990). But this exception does

not apply when 1) the issue does not solely involve questions of law and 2) the argument has not been raised by the parties to the appeal. *Shoels v. Klebold*, 375 F.3d 1054, 1062 (10th Cir. 2004).

Tate requests that this court determine that the Seventh Circuit exceeded its discretion in raising *sua sponte* a pivotal argument never advanced by EMS either before the district court or on appeal. The Seventh Circuit abused its discretion by raising an issue and then advocating a particular position which resolved the appeal based upon that advocacy.

> The impropriety of reversing the decision of a district court on the basis of an argument not made by an appellate is self-evident. First and foremost, the unfairness to the appellee is intolerable under our adversarial system. The Supreme Court has wisely cautioned against such judicial conduct that deprives a party of its right to be heard on an issue. *Singleton v. Wulff*, 428 U.S. 106, 119-21, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (reversing a merits determination made by a federal appellate court because the party against whom judgment was entered had no opportunity to present arguments on the merits).

Gaither v. Aetna Life Ins. Co., 388 F.3d 759, 778 (10th Cir. 2004). The precise grounds for the Rule 50 motion were not preserved. Furthermore, the precise arguments regarding Tate's reasonable but subjective beliefs were never made or preserved. The specificity requirement for preserving the issue is obligatory. *Lambert v. Genesee Hosp.*, 10 F.3d 46, 54 (2nd Cir. 1993), *cert. denied*, 511 U.S. 1052, 114 S.Ct. 1612, 128

L.Ed.2d 339 (1994). The manufactured grounds relied upon by the Seventh Circuit are deemed forfeited. The Supreme Court has deemed the forfeiture rule essential in order that the parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide and that it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. *Hormel*, 312 U.S. at 556. This rule of forfeiture applies equally to arguments, factual assertions, and legal theories that were not urged below.

The Seventh Circuit raised an issue (Tate's belief) on behalf of Respondent and then advocated this issue against Petitioner. Such judicial conduct deprived Petitioner of his right to be heard. Review is necessary so that this Court may remedy the Seventh Circuit's abuse of discretion and establish appropriate parameters to an appellate court's discretion to resolve *sua sponte* a case-determinative issue that was never preserved, litigated or briefed in the proceedings below.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter. In the alternative, given the similarity of the issues in this case to the questions presented in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 06-1595 (oral argument 10/08/08), that this case be held pending decision in *Crawford*.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 07-2575

[Filed October 10, 2008]

ALSHAFI TATE,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
EXECUTIVE MANAGEMENT SERVICES, INC.,	)
	)
Defendant-Appellant.	)
	)

Appeal from the United States District Court
for the Northern District of Indiana,
Fort Wayne Division.
No. 05 C 47—**Theresa L. Springmann,** *Judge.*

ARGUED MAY 7, 2008—
DECIDED OCTOBER 10, 2008

Before BAUER, POSNER, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge*. Alshafi Tate, a former employee of Executive Management Services ("EMS"), claims that his supervisor, Dawn Burban, threatened to fire him if he refused to continue their sexual relationship. When Tate rejected her ultimatum, Burban instigated an altercation that led to his termination. Tate filed suit, alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964. After a trial, the jury rejected Tate's sexual harassment claim, but found in his favor on his retaliation claim. EMS appeals, arguing that Tate did not engage in protected conduct. EMS further maintains that Tate cannot prove that his termination was connected to his refusal to have sex with Burban because the decision to fire Tate was made pursuant to an independent investigation. Because Tate has not shown that he engaged in protected conduct, we reverse the district court's decision.

I. BACKGROUND

EMS hired Alshafi Tate on August 19, 2002, to clean office buildings in Indianapolis, Indiana. His field supervisor was Dawn Burban, an EMS project manager for commercial cleaning. Burban picked Tate to be on her team, and within five to eight days after starting work for EMS, Tate says that he and Burban began having consensual sex two or three times per week, sometimes at work and other times at the home of a co-worker. Burban, however, denies that there was ever a sexual relationship. A week after Tate was hired, EMS promoted Tate to a supervisor based on Burban's recommendation and raised his pay from $7.00 per hour to $8.00 per hour.

Tate testified at trial that he and Burban engaged in consensual sex throughout his employment with EMS, with the exception of a period in 2003 in which he worked in a different building from Burban. Tate tried to end his sexual relationship with Burban in October 2003. He stated that he decided to end the relationship because after he got married in August 2003, Burban would repeatedly call his home, upsetting his wife. Tate also indicated that he wanted to end the relationship because he "just wanted to keep the slate clean between me and my wife" and that Burban "was trying to make a hard choice for me." When Tate tried to end the relationship, Burban not only told him that she expected their sexual relationship to continue, she also informed him that if the relationship ended, he would lose his job. Tate testified that in December 2003, at a holiday dinner party with other co-workers, Burban again told him he had to continue having sex with her or he would lose his job. He maintains that he told Burban that he was not interested in continuing the relationship, and she responded that she would give him "a couple days to think about it." Tate testified that about two weeks after the holiday party, Burban inquired again whether Tate had "made a choice yet." It is not clear how he responded to this inquiry.

When Tate arrived for the start of his evening shift on January 13, 2004, at the City/County Building in Indianapolis, Burban summoned him into her office. Burban closed her office door and asked Tate if he had made his decision. Tate stated, "Yeah, I made a decision," and when he told her that he "wasn't messing with her anymore," there was a "big scene" in which Burban raised her voice and told Tate that he did not "know who [he was] f—king with" and that he

"could leave right now." Tate further testified that he left Burban's office, but she followed him out into the break room, "hollering and getting irate" and saying "she's going to have my job" and "going to have my ass fired." Tate told Burban to call Darren Taylor, who was Burban's immediate supervisor and who was off-site at the time. Both Tate and Burban testified that Burban called Taylor, but did not give Tate an opportunity to speak with Taylor. Taylor directed Burban to tell Tate to go home, and Tate was escorted off the premises by a court security officer named Dan Hudson. Hudson also testified at trial and indicated that he came upon an argument in progress between Burban and Tate and heard Burban tell Tate, "If you can't do what I tell you to do, just leave."

Tate testified that, prior to his departure, Burban did not direct him to perform any work-related assignment nor did he refuse to perform any work-related assignment. Burban, however, testified that Tate refused to go to his new assignment; that he did not provide a reason for this refusal; and that he became loud and belligerent after receiving his new assignment. After Tate left, Burban telephoned Nancy Scheumann, EMS's general manager for the Fort Wayne area at the time, and told Scheumann that Tate had refused to do his assigned work that evening so she sent him home. Burban then prepared an "insubordination" incident report stating that Tate had refused her request to help clean the Merrill Lynch building. In this report, Burban claimed that Tate said cleaning the MerrillLynch building was "not his job"; that he only had to do certain tasks, which Burban determined would have taken only 5.5 hours to perform; and that Burban told him he was "here for 8 hours" and needed "to do 8 hours worth of work." The

incident report further stated that Burban told Tate to go home after he continued to refuse the assignment, and that a security guard from the courthouse was present, heard what was going on, and watched Tate leave the building.

The next day, Tate attempted to telephone both Scheumann and Taylor to discuss the prior evening's events. When he contacted EMS's headquarters in Indianapolis, however, he reached Lorinda Lentz, a human resources official, who told Tate that he was terminated for insubordination and asked him to turn in his pager and uniforms. According to Lentz, the conversation lasted less than a minute. Tate testified that he asked if he could explain his side, but Lentz did not give him the opportunity.

Although Burban signed the termination report and Lentz communicated the decision to Tate, EMS maintains that the decision to terminate Tate's employment was made by Scheumann. Scheumann testified that she made the decision to terminate Tate by 8:50 a.m. on January 14, 2004, the morning following the altercation, after speaking to Burban, Taylor, and Hudson, and reviewing Tate's employment record. However, Hudson testified that he did not speak to Scheumann until "[s]ometime after the incident happened, maybe a month later or perhaps even sometime shorter than a month." Schuemann also did not speak to Tate about the incident and stated that "the fact that he refused to do what he was being asked to do by his supervisor" was considered insubordination, "and it wasn't a situation where it deemed [sic] an investigation of that incident."

The jury returned a verdict in Tate's favor on the retaliation claim and found against Tate on his sexual harassment claim. After trial, EMS renewed its motion under Federal Rule of Civil Procedure 50(b) for judgment as a matter of law or in the alternative, a motion for a new trial, asserting: (1) Tate did not engage in any protected activity when he told his supervisor he would not continue to have sex with her to keep his job, and (2) EMS had no knowledge that Tate's supervisor had a retaliatory motive for her actions, and EMS discharged Tate based on the report of Hudson, who was a disinterested witness.

The district court denied EMS's post-trial motion. The court concluded that Tate had engaged in statutorily protected activity because "rebuffing sexual harassment can in some situations be considered opposition to an unlawful employment practice." The district court also concluded that the trial record would permit a reasonable jury to hold EMS liable, stating "there was sufficient evidence for the jury to find that Scheumann was Burban's rubber stamp and that Scheumann failed to conduct any independent investigation" of Tate's claims insulated from the discriminatory animus. EMS appeals.

II. ANALYSIS

We review *de novo* the district court's denial of a motion for judgment as a matter of law under Rule 50(b). *Waite v. Bd. of Trs.*, 408 F.3d 339, 343 (7th Cir. 2005). "Once a jury has spoken, we are obliged to construe the facts in favor of the parties who prevailed under the verdict." *Tart v. Ill. Power Co.*, 366 F.3d 461, 464 (7th Cir. 2004) (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000)).

We "examine all of the evidence in the record to determine whether the evidence presented was sufficient to support the jury's verdict," but in doing so, we do not "make credibility determinations or weigh the evidence." *Waite*, 408 F.3d at 343 (citing *Reeves*, 530 U.S. at 150). In sum, we "will overturn a jury verdict for the plaintiff only if we conclude that no rational jury could have found for the plaintiff." *Id.*

Here, the jury concluded that Tate had proven facts sufficient to establish retaliation under Title VII and further, that the investigation conducted by EMS into Tate's termination was sufficiently tainted by Burban's discriminatory bias. EMS argues that Tate's retaliation claim never should have gone to the jury. Title VII provides that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. §2000e-3a. A plaintiff claiming retaliation under Title VII must show: "1) a statutorily protected activity; 2) an adverse action taken by the employer; and 3) a causal connection between the two." *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 792 (7th Cir. 2007).

In order for Tate to have engaged in protected conduct, he does not have to prove that Burban sexually harassed him; therefore, the fact that the jury found against him on his sexual harassment claim, a finding he does not appeal here, is not dispositive. *See Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002) ("a plaintiff need not prevail on her Title VII discrimination claim or have opposed an action that in fact violated Title VII to win a retaliation claim"). In order to engage in protected conduct, Tate only has to

show that he "reasonably believed in good faith the practice [he] opposed violated Title VII." *Id.*

As a threshold matter, there is a circuit split about whether a person who rejects a supervisor's sexual advances has engaged in a protected activity. *Compare LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 389 (5th Cir. 2007) (holding that a single, express rejection of sexual advances does not constitute "protected activity" for purposes of a retaliation claim) *with Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (finding that when the plaintiff told her supervisor to stop harassing her, she engaged in the most "basic form of protected conduct"). We have not addressed this issue. *See Murray v. Chi. Transit Auth.*, 252 F.3d 880, 890 (7th Cir. 2001) (declining to resolve the issue of whether a plaintiff who rejects a sexual invitation from a supervisor has engaged in protected conduct because the plaintiff did not show an adverse employment action). Even if we assume, for purposes of argument, that there may be circumstances in which a person who rejects his supervisor's sexual advances has engaged in a protected activity, Tate has not shown that he "reasonably believed in good faith the practice [he] opposed violated Title VII." *Fine*, 305 F.3d at 752.

There is simply no evidence in the record that Tate believed that Burban's actions were unlawful. In fact, the only statements that Tate made to Burban were that they "were not good with each other" and he "was not messing with her anymore," statements which do not indicate that Tate believed he was being sexually harassed. *Cf. Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1450 (7th Cir. 1994) (finding that the plaintiff had a good faith belief that she was opposing conduct

that violated Title VII because after plaintiff found out that her supervisor's behavior would violate the law, she complained directly to management and to the supervisor, "indicating that his [inappropriate] comments and other conduct made her 'very uncomfortable,' that she intended to keep a log of his conduct, and that she hoped her objections would discourage any similar behavior in the future"); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1315 (7th Cir. 1989) (finding that the "sincerity of [the plaintiff's] belief is amply supported by her assertion that she threatened to take her complaint about [her supervisor] to the EEOC and did in fact subsequently contact the EEOC"). Even when asked by his counsel what he would have said to management if given the opportunity after the altercation with Burban, Tate indicated that he would have told Scheumann and Taylor that he felt he was "wrongly mistreated," and that he was not being insubordinate. Moreover, Tate stated that he would have had Taylor confirm that Burban had previously called Tate's home and had an argument with Tate's wife, an altercation which Burban mentioned while in Taylor's presence. All of these statements point to personal reasons for ending the relationship rather than concerns about the legality of Burban's behavior.

We do not dispute that Tate protested about Burban's behavior; the problem is that he did not necessarily believe that her behavior was illegal at the time. *See Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004) ("The purpose of requiring that plaintiffs reasonably believe in good faith that they have suffered discrimination is clear. Title VII was designed to protect the rights of employees *who in good faith protest the discrimination they believe they*

have suffered and to ensure that such employees remain free from reprisals or retaliatory conduct.") (emphasis added). Indeed, Tate testified that he "wanted to leave Dawn" so that he could "start off with a clean slate" and "be true" to his wife. While there are no "magic words" that a plaintiff must use in order to indicate that the supervisor's behavior is unlawful, *Gates v. Caterpillar, Inc.*, 513 F.3d 680, 687 (7th Cir. 2008), the record is devoid of any statements that indicate sexual harassment was at issue. Because Tate has failed to establish that he had a good faith belief that he was being sexually harassed, EMS is entitled to judgment as a matter of law.

III. CONCLUSION

Accordingly, the judgment of the district court is REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CASE NO. 1:05-CV-47-TS

[Filed June 4, 2007]

ALSHAFI TATE,	)
	)
Plaintiff,	)
	)
v.	)
	)
EXECUTIVE MANAGEMENT SERVICES, INC.,	)
	)
Defendant.	)
	)

OPINION

This matter is before the Court on the Defendant's Motion for Judgment as a Matter of Law or a New Trial. The Defendant filed a motion for a directed verdict on September 28, 2006. The jury returned its verdict on September 28, 2006, and determined that the Plaintiff failed to prove his sexual harassment claim. However, the jury found the Defendant liable for retaliation. The jury awarded the Plaintiff no compensatory damages. The Court issued its ruling

denying the motion for directed verdict on October 12, 2006.

The Defendant presents the same two arguments in its second motion for judgment as a matter of law as it did in its first motion: first, that the Plaintiff did not oppose conduct made unlawful by Title VII, and second, that the Defendant performed an independent investigation adequate to prevent it from being liable for its employee's retaliatory motive. The Defendant has supplemented its previous argument with additional reasoning and case law. The Court sees nothing to justify altering its decisions. The Defendant also asks for a new trial; the Court denies that motion as well.

A. Motion for Judgment Notwithstanding the Verdict

A judgment as a matter of law is granted when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). "[T]he standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 149 (2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–51 (1986)).

In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences and resolve all doubts in favor of that party. *NLFC, Inc. v. Devcom Mid-Am., Inc.*, 45 F.3d 231, 234 (7th Cir. 1995). A court's role is

not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson*, 477 U.S. at 249–50.

The district court should "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 151. "That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.* (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2529 (2d ed. 1995)).

1. Whether the Plaintiff Opposed an Unlawful Employment Practice

The Defendant argues that the Plaintiff did not oppose statutorily protected activity because ending a consensual sexual relationship is not opposition to an unlawful employment practice. The Defendant does not address the reasoning of those cases that find rebuffing sexual advances to constitute opposition to unlawful conduct, or the reasoning behind this Court's previous opinions addressing this issue. (Opinion, May 12, 2006, DE 55; Opinion, October 12, 2006, DE 93.) The Court will briefly summarize its previous holdings.

A straightforward reading of the statute's text requires finding that rebuffing sexual harassment can in some situations be considered opposition to an unlawful employment practice. The applicable

subsection states "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice." 42 U.S.C. § 2000e-3(a). It is an unlawful employment practice to threaten a person with termination if he or she refuses to continue in a sexual relationship. *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1226 n.7 (7th Cir. 1997) ("[H]arassment, occurs when the receipt of benefits or the maintenance of the status quo is conditioned on acquiescence to sexual advances.") When an employee is given an ultimatum that continued employment depends on continuing a sexual relationship, and the employee says "no more," that employee could reasonably be understood to be opposing continuing the sexual relationship and to be opposing a change in the terms of his employment. As the Plaintiff notes in his brief, "Tate not only refused Burban's ultimatum to have sex, he did so under the express threat of termination by Burban." (Pl Br. 5, DE 107.) When the protesting employee is terminated, the termination could be motivated by the opposition to the change in employment terms, the opposition to the sexual relationship, or both. The retaliation claim intertwines with the harassment claim, but they are not identical.

Those courts holding that rebuffing sexual harassment is not opposition to an unlawful practice are not convincing. For example, the court in *Del Castillo v. Pathmark Stores, Inc.*, 941 F. Supp. 437 (S.D.N.Y. 1996), held that "where the alleged 'protected activity' consists simply of declining a harasser's sexual advances," declining advances is not "protected activity" because otherwise, "every harassment claim would automatically state a

retaliation claim as well." *Id.* at 438–39. The Court disagrees. As stated above, opposing the employment practice of sexual harassment and declining a sexual invitation are distinct, even though they may be intertwined. The court in *Rashid v. Beth Israel Med. Center*, 1998 WL 689931, *2 (S.D.N.Y. 1998), stated that such a retaliation claim is duplicative and unnecessary, and runs the risk of confusing a jury. The concerns about the retaliation claim being duplicitive, unnecessary, or confusing are not good reasons to ignore the plain text of the statute.

The jury in this case found that the elements of sexual harassment were not satisfied, but that the Defendant retaliated against the Plaintiff for opposing an unlawful employment practice. The jury could have reasonably found from the evidence that the Plaintiff proved that he was terminated because he opposed the unlawful practice of making employment contingent on sex, and that the Plaintiff did not prove the elements of his harassment claim.

For these reasons, the Court declines to alter its decision regarding the Plaintiff's retaliation claim.

2. *Whether the Defendant had Knowledge Sufficient to Justify Employer Liability*

The Defendant argues that it had no knowledge of Ms. Burban's conduct toward the Plaintiff and therefore, cannot be liable for her retaliation. The Defendant's first motion for judgment as a matter of law made this same argument, and this Court held that the Seventh Circuit's holding in *Byrd v. Illinois Department of Public Health*, 423 F.3d 696 (7th Cir. 2005), foreclosed the Defendant's argument because it

held that an employer could be liable for the retaliatory motive of one who provided information that the decision maker relied on to make the adverse employment decision. *Id.* at 711–12.

The Defendant now argues that this case is different from *Byrd* because in this case, the decisionmaker contacted a disinterested witness who provided information corroborating the biased subordinate, Dawn Burban. In this case, the Defendant's decisionmaker, Nancy Scheumann, testified that she received a report from Burban that the Plaintiff was insubordinate and refused a work assignment. The Defendant states in its brief that Scheumann also testified that Dan Hudson, the security guard at the place Burban and Tate worked, "relayed to her that the argument between Mr. Tate and Ms. Burban related to Mr. Tate's refusal of a specific work assignment on the night in question." (Def. Br. 10, DE 105.) The Defendant stated that Hudson confirmed this fact. Hudson did not confirm Scheumann's testimony. Hudson stated that he may have spoken to an employee of the Defendant's other than Dawn Burban about a month after the incident. However, this conversation concerned whether he would testify for the Defendant. Hudson said he was told he may have to give a prepared statement. When asked whether he spoke to someone from the Defendant the very next day, Hudson said it was possible, but he did not remember. He also stated that he never discussed the substance of what he saw or what the argument was about. This testimony contradicts Scheumann's statement that she called Hudson and heard his independent account of the events. Therefore, the Court accepts the testimony to favor the Plaintiff, and assumes no conversation

between Scheumann and Hudson took place regarding the incident between Burban and Tate. If the jury believed Hudson and not Scheumann, and believed that there was no independent investigation, the jury could find that Scheumann acted as a cat's paw for Burban's retaliatory motive.

This would be the end of the Court's analysis, but for a recent decision of the Seventh Circuit in *Brewer v. Board of Trustees of University Illinois*, 479 F.3d 908 (7th Cir. 2007), cited by the Defendant. The *Brewer* court addressed a case involving a university employee fired for altering his parking permit. The employee alleged that his superior gave him permission to do so, and, because of her racial bias, she did not tell the decisionmaker this information when he was terminated for altering his tag. However, the employee did not talk to the decisionmaker at all about the events or about the superior's bias, so that the decisionmaker was never aware of the superior's alleged bias. The decisionmaker stated that she terminated the employee because he altered the parking tag. She inspected and verified for herself that the tag was altered. *Id.* at 913–14. The Defendant argued that it could not be liable for the bias of the superior because the decisionmaker did an independent investigation and did not act as a rubber stamp of the biased superior's attempt to have the employee terminated.

This case is similar to *Brewer* in that it involves a biased employee without authority to terminate using influence over a decisionmaker to have the employee terminated for a particular instance of misconduct. The *Brewer* court attempted to clarify when an employer could be liable in such a situation:

> where a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker. It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source.

Id. at 918 (citations removed). The court admitted that "our approach to Title VII cases involving an employee's influence over a decision maker has not always been completely clear. Our opinions have sometimes suggested that not only significant influence, but any influence over an employment decision is sufficient to impose Title VII liability on an employer." *Id.* at 919. The court limited these cases to contexts other than those concerning "an employee's discipline for particular misconduct." *Id.* Applying the narrowed concept of "significant influence," the *Brewer* court went on to hold that the biased superior did not exercise significant influence over the decisionmaker by withholding the fact that she gave the employee permission to alter the parking permit. Because the employee, without reason, did not attempt to bring his side of the story to the decisionmaker, the decisionmaker's examination of the parking pass qualified as an independent investigation eliminating the possibility of employer liability. *Id.*

Two differences distinguish the instant case from *Brewer*. First, taking into account the facts that favors

the Plaintiff, there was no independent investigation. The Defendant relies on its claim that Scheumann called Hudson to confirm Burban's claims about the work incident, but that testimony is contradicted by Hudson. Second, the Plaintiff testified that he attempted to talk to his superiors, but was prevented from doing so. In this case, there was sufficient evidence for the jury to find that Scheumann was Burban's rubber stamp, and that Scheumann failed to conduct any independent investigation.

B. Motion for a New Trial

Federal Rule of Civil Procedure 59 allows a court to grant a new trial "in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). Rule 61 states that

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Fed. R. Civ. P. 61. In other words, "[i]n order to receive a new trial, the defendant must show that the error

was substantial enough to deny him a fair trial." *Perry v. Larson*, 794 F.2d 279, 285 (7th Cir. 1986).

"The court has the power and duty to order a new trial whenever, in its judgment, this action is required in order to prevent injustice." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2805 (2006). A prejudicial error of law may justify a new trial. *Id.* A new trial may also be granted if the verdict is against the weight of the evidence. *Id.* In determining whether to grant a new trial, "a jury verdict must be accorded great deference." *Foster v. Cont'l Can Corp.*, 783 F.2d 731, 735 (7th Cir. 1986). Also, "unlike a J.N.O.V. motion, the judge may consider the credibility of the witnesses, the weight of the evidence, and anything else which justice requires." *Spanish Action Comm. of Chi. v. City of Chi.*, 766 F.2d 315, 321 (7th Cir. 1985).

The Defendant argues that the jury's verdict was against the weight of the evidence, and could only be reached by making an extraordinary number of inferences. The Court disagrees. The Plaintiff testified that he was given an ultimatum: continue the relationship with Burban or be fired. He ended the relationship. He testified that Burban told him to leave and he was fired the next day. This story was not incredible, and the jury was not out of line in crediting the Plaintiff's testimony. Scheumann's testimony was rather reluctant, and not especially convincing. Her testimony abut the investigation contradicted that of Hudson. The jury's verdict is entitled to deference, and allowing it to stand is not unjust. The Defendant's motion for a new trial is denied.

ORDER

The Plaintiff's motion for Sur-Reply [DE 112] is DENIED because it is unnecessary. The Defendant's motion for judgment or new trial [DE 104] is DENIED.

SO ORDERED on June 4, 2007.

/s/ Theresa L. Springmann
THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

No. 1:05-CV-47

[Filed October 12, 2006]

ALSHAFI TATE,	)
	)
Plaintiff,	)
	)
v.	)
	)
EXECUTIVE MANAGEMENT SERVICES, INC.,	)
	)
Defendant.	)
	)

OPINION

This case involves two claims by Plaintiff Alshafi Tate. First, the Plaintiff claimed he was discriminated against because of his sex by being sexually harassed. Second, the Plaintiff claims the Defendant, Executive Management Services, Inc. ("EMS") retaliated against him for opposing this unlawful practice.

This matter is before the Court on the Defendant's Motion for Judgment as a Matter of Law, made on

September 27, 2006, during the second day of the jury trial in this case. The Motion was filed with the Court on September 28, 2006. The motion sought the dismissal of both claims and the denial of the Plaintiff's request for punitive damages. The Court granted the Defendant's motion to dismiss the Plaintiff's request for punitive damages and deferred ruling on the sufficiency of the Plaintiff's claims until after the jury returned with its verdict. The jury returned its verdict on September 28, 2006, and determined that the Plaintiff failed to prove his sexual harassment claim. However, the jury found the Defendant liable for retaliation. The jury awarded the Plaintiff no compensatory damages. The only issue remaining for the Court to determine is whether to grant the Defendant's motion for directed verdict on the Plaintiff's retaliation claim. For the reasons stated below, the Court denies the Defendant's motion.

A. Standard for Rule 50 Motions

A judgment as a matter of law is granted when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . . ." Fed. R. Civ. P. 50(a). "[T]he standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 149 (2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–51 (1986)).

In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences and resolve all doubts in

favor of that party. *NLFC, Inc. v. Devcom Mid-Am., Inc.*, 45 F.3d 231, 234 (7th Cir. 1995); *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994); *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1440 (7th Cir. 1992). A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson*, 477 U.S. at 249–50; *Doe*, 42 F.3d at 443.

B. Factual and Procedural Background

The Plaintiff filed for summary judgment on December 21, 2005. The Court in its May 12, 2006, Opinion, denied the motion for summary judgment. The relevant facts presented in the motion for summary judgment differ little from what was presented at trial.

At trial, the Plaintiff testified that he had consented to a sexual relationship with his supervisor, Dawn Burban. After he attempted to end the relationship, Burban gave him an ultimatum: he would have to choose between his wife and his job. He took this to mean that if he ended the sexual relationship with Burban, he would lose his job. When she confronted him and asked for his answer, he told Burban he "wasn't messin' with her anymore." Burban responded by cursing and yelling at the Plaintiff, telling him to leave the building and that he would lose his job.

Burban called her supervisors and told them the Plaintiff was insubordinate because he refused a work assignment. Burban filled out the termination form for

the Plaintiff, and the Plaintiff received a call the next day that he was terminated from his position. The Defendant's purported decision maker testified at trial that she took Burban's statements into account when deciding whether to terminate the Plaintiff.

C. Analysis

The Defendant argues that the Plaintiff's retaliation claim fails because the Defendant was never aware of Burban's conduct toward the Plaintiff and that the Plaintiff never opposed an unlawful employment practice.

1. Whether the Defendant had Knowledge Sufficient to Justify Employer Liability

The Defendant argues it had no knowledge of the Plaintiff's alleged opposition to an unlawful employment practice, and so it cannot be liable. The same argument was presented by the Defendant in *Byrd v. Illinois Department of Public Health*, 423 F.3d 696 (7th Cir. 2005). In that case, the plaintiff, Lester Byrd, claimed that he had been discriminated and retaliated against. Byrd presented evidence that a non-supervisory employee with whom he worked was biased against African-Americans and provided information to Byrd's supervisors about his misconduct at work. Byrd reported incidents involving the non-supervisory employee to the defendant's equal employment officer, and eventually filed a claim. The information provided by the biased non-decisionmaker led to poor reviews of Byrd's work, lower salary, and a suspension. The case went to trial and the jury found that the defendant had retaliated against Byrd. The defendant argued that it should not be liable because

it had no knowledge of the nondecisionmaker's illegal bias and objected to the "cat's paw" instruction that was given to the jury. The court held that the defendant could be liable for retaliation because the nondecisionmaker was involved in the review process of Byrd, and his bias could have caused the adverse employment decisions. *Id.* at 708. The court explained that an employer could be liable for the retaliatory motive of one who provided information that the decision maker relied on to make the adverse employment decision. *Id.* at 711–12 ("[I]f the Department would not have disciplined Byrd but for [the non-supervisory employee's] recommendations, recommendations that a jury could reasonably find were motivated by an illegal motive, then [the non-supervisory employee's] bias was a cause of Byrd's injury whether or not [the decision-maker] could reasonably be thought a mere cat's paw.")

In this case, it is uncontested that Dawn Burban, who the Plaintiff claims was his supervisor, reported to her superiors that there was an incident with the Plaintiff and filled out the termination form. The Defendant's decision maker stated at trial that one of its reasons for terminating the Defendant was the altercation as reported by Burban. If the jury believed that Burban was motivated by a retaliatory animus in supplying the information to the Defendant, and the Defendant's decision maker relied on that information in deciding to terminate the Plaintiff, it could have reasonably found the Defendant liable for the non-decision maker's retaliatory motive. The Defendant does not address or attempt to explain why it cannot be liable under a cat's paw theory, as stated in *Byrd*.

2. Whether the Plaintiff Opposed an Unlawful Employment Practice

The Defendant argues the Plaintiff did not oppose an unlawful employment practice, and so, the Plaintiff's retaliation claim must be dismissed. The Plaintiff made this argument in its motion for summary judgment, and the Court declines to alter its judgment.

Title 42 U.S.C. § 2000e-3 states, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."§ 2000e-3(a). At issue is whether the Plaintiff "opposed any practice made an unlawful employment practice."

When the Court addressed this issue in its May 12, 2006, Opinion, the Court held that, viewing the evidence in a light most favorable to the Plaintiff, the Plaintiff's statements declining to continue the sexual relationship with Burban in response to her ultimatum were in opposition to an unlawful employment practice and were protected. (May 12, 2006, Opinion 9, DE 55.) Therefore, there was a material issue of fact as to whether the Plaintiff opposed an unlawful employment practice.

The Court relied upon *Roberts v. County of Cook*, 2004 WL 1088230 (N.D. Ill., May 7, 2004) in holding that the Plaintiff's statements constituted opposition

to an unlawful employment practice. (May 12, 2006, Opinion 8, DE 55.) The *Roberts* court held that "refusing sexual advances is protected activity under Title VII." *Roberts*, at *5. This is because Title VII makes it unlawful for an employer to discriminate against any of his employees because he has opposed an unlawful employment practice, and sexual harassment is an unlawful employment practice. Therefore, "[o]pposing sexually harassing behavior constitutes 'oppos[ing] any practice made an unlawful employment practice' by Title VII, and accordingly it is activity protected by § 2000e-3(a)." *Id.* at 5. The Court's May 12 Opinion relied on *Roberts* and found that there was at least a material issue of fact as to whether the Plaintiff opposed unlawful conduct. The evidence presented at trial is the same as what was considered at summary judgment and the Court sees no reason to alter its ruling.

For the reasons stated, the Defendant's motion for directed verdict [DE 78] is DENIED.

SO ORDERED on October 12, 2006.

s/Theresa L. Springmann
JUDGE THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

No. 1:05-CV-47

[Filed May 12, 2006]

ALSHAFI TATE,	)
	)
Plaintiff,	)
	)
v.	)
	)
EXECUTIVE MANAGEMENT SERVICES, INC.,	)
	)
Defendant.	)
	)

MEMORANDUM OF OPINION AND ORDER

This matter is before the court on the Motion for Summary Judgment filed by Defendant Executive Management Services, Inc. ("EMS") on December 21, 2005. After having been granted an extension of time in which to do so, Plaintiff Alshafi Tate ("Tate") filed a response in opposition to the motion on February 3, 2005, and EMS filed a reply on March 3, 2006. Then, on March 8, 2006, EMS filed a Notice of Partial Withdrawal of Motion for Summary Judgment and

Tate filed a Motion to File Sur-Reply. The motion for permission to file a sur-reply was granted on March 9, 2006, and Tate's sur-reply brief was docketed on that same date.

For the reasons discussed herein, the motion for summary judgment is DENIED.

PROCEDURAL BACKGROUND

In addition to the motion for summary judgment, other motions and notices were filed in this case, but they have since been resolved. On February 24, 2006, EMS filed a Motion for Leave to File a Second Amended Answer (Docket at 44), to which Tate filed a response in opposition on February 27, 3006 (Docket at 45). Then, on April 6, 2006, EMS filed a Notice of Withdrawal of its motion for leave to file an amended answer. Docket at 52. On April 10, 2006, Magistrate Judge Cosbey, to whom this case is on partial referral, issued an Order formally acknowledging that EMS's motion was withdrawn. Docket at 53.

Then, on April 13, 2006, the court held a conference in this case in order to ensure that the record was clear with regard to the issues to be addressed in the pending motion for summary judgment. When the motion was originally filed, EMS sought summary judgment on all of Tate's claims, which included race discrimination, sex discrimination, and retaliation. EMS based its motion mostly on a judicial estoppel argument. However, just after the briefing was concluded, the Seventh Circuit Court of Appeals issued an opinion which foreclosed EMS's judicial estoppel argument. EMS promptly filed a Notice of Partial Withdrawal of Motion for Summary Judgment,

conceding that the recent appellate court opinion eliminated the legal basis for the company's argument. Docket at 47. In addition, during the conference on April 13, Tate withdrew his race discrimination claim in this case. The parties agreed that genuine issues of fact exist with regard to Tate's sex discrimination claim, and they are prepared to proceed to trial on that claim. As a result of these developments, the only claim this court is now called upon to resolve is Tate's claim that his termination from employment with EMS was retaliatory.[1]

FACTUAL BACKGROUND

Tate brought this action on February 4, 2005. In his Complaint, Tate alleges that EMS discriminated against him in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) and 42 U.S.C. § 1981. Complaint, Docket at 1, pp. 1-2. He asserted claims for race discrimination, gender discrimination (sexual harassment), and retaliation. *Id.* However, as explained above, Tate has withdrawn his race discrimination claim, the parties have conceded that fact issues exist with regard to Tate's sex discrimination claim (and they are prepared to proceed to trial on that issue), and Tate's retaliation claim is the only claim on which EMS still seeks summary judgment.

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[1] The court also notes that the sur-reply filed by Tate on March 9 (Docket at 50) dealt only with the judicial estoppel argument that had been presented by EMS. Since that argument was withdrawn, no other references to Tate's sur-reply brief are made during the court's analysis and discussion of the motion for summary judgment.

EMS is a corporation that provides janitorial and other maintenance services for commercial buildings. Brief in Support of Motion for Summary Judgment ("Brief in Support"), Docket at 34, p. 2. Tate was employed by EMS, in the position of custodian, beginning on August 16, 2002. *Id.* On August 26, 2002, Tate was promoted to the position of supervisor. *Id.* During the course of his employment, one of Tate's supervisors was Dawn Burban ("Burban"). *Id.* At some point during his employment, Tate became involved in a sexual relationship with Burban. *Id. See also*, Plaintiff's Brief in Opposition to Motion for Summary Judgment ("Brief in Opposition"), Docket at 39, p. 13.[2] Tate alleges that on or about January 13, 2004, he ended this sexual relationship with his supervisor. Brief in Opposition, p. 13. On January 14, 2004, Tate was fired. Brief in Support, p. 3. Tate claims that the termination of his employment constituted retaliation, in that he was fired by Burban (or at her direction or request) after ending their intimate relationship. Complaint, p. 2. For its part, EMS does not state why Tate was fired. The company does state, however, that its "decision to terminate Plaintiff's employment was made without regard to any classification or activity protected by Title VII . . . ." Answer to Complaint, Docket at 7, p. 3; *see also*, Amended Answer to Complaint, Docket at 31, p. 3. EMS argues that the facts do not support any claim for retaliation under Title VII (*Id.*, p. 11). Accordingly, it is not necessary

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[2] EMS states that "it disputes whether this relationship even existed, but is accepting that fact for summary judgment purposes." Reply Brief in Support of Defendant's Motion for Summary Judgment ("Reply Brief"), Docket at 46, p. 2.

under the facts and arguments before the court for EMS to provide an explanation for Tate's dismissal.[3]

DISCUSSION

EMS argues that Tate cannot maintain a claim for retaliation "because he never opposed any conduct made unlawful by Title VII prior to his discharge." Brief in Support, p. 11. In order to establish a *prima facie* case of retaliation, a plaintiff must show that: 1) he engaged in statutorily protected expression; 2) he suffered an adverse employment action; and 3) there is a causal link between the protected expression and the subsequent adverse action. *Murray v. Chicago Transit Authority*, 252 F.3d 880, 890 (7th Cir. 2001). In the present case, it is undisputed that Tate did not complain about his relationship with Burban to anyone at EMS other than Burban herself. He did not "go over her head" and tell anyone in EMS management that he felt he was being sexually harassed, nor did he file any sort of grievance or raise any sort of protest within EMS. Because of this, EMS argues that Tate fails to establish the first element of a *prima facie* case of retaliation since no one at EMS (other than Burban, who was allegedly participating in the sexual relationship) knew anything about that relationship. EMS argues as follows:

> . . . Tate cannot prevail on his retaliation claim because he kept silent about this alleged misconduct and did not report it to anyone in

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[3] Tate claims that he was fired for "insubordination" after having gotten into a verbal dispute with Burban. Brief in Opposition, p. 6. EMS does not respond to this factual assertion in its briefing.

> EMS management. Proof of the employer's knowledge of the alleged discriminatory conduct and corresponding protected activity "is implicit in the first element of this Circuit's prima facie case [of retaliation] under the indirect methodology." *See Durkin v. City of Chicago*, 341 F.3d 606, 614 n. 4 (7th Cir. 2003). This is because "[a]n employer cannot retaliate if there is nothing for it to retaliate against." *Id.* at 615. EMS was completely unaware of the relationship and could not therefore have retaliated against Mr. Tate on that basis.

Brief in Support, p. 12. Furthermore, EMS points out that even if one construes Tate's ultimate act of ending the relationship as an expression against sexual harassment, "[c]onsensual sexual relationships do not constitute unlawful activity under Title VII." *Id.*, p. 11 (citing *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 668 (7th Cir. 2001). "Accordingly, in ending his voluntary affair with Ms. Burban, Mr. Tate was not opposing conduct made unlawful under Title VII. He therefore cannot rely on that activity to establish his *prima facie* case of retaliation." *Id.*, pp. 11-12.

EMS's arguments appear imminently logical on their face. However, Tate argues in response that "rebuffing a supervisor's sexual advances is a protected activity under Title VII. If not, then a supervisor could immediately terminate the 'rebuffing' employee and get away with it. Title VII would offer no protection to the discharged employee. That cannot be the law." Brief in Opposition, Docket at 39, p. 15. Tate then goes on to present a discussion of this issue which is found in *Roberts v. County of Cook*, 2004 WL 1088230 (N.D. Ill., May 7, 2004). *Id.* In *Roberts*, the district court

concluded that "refusing sexual advances is protected activity under Title VII." The court explained that a "victim of harassment should not fear retaliation if she resists sexually predatory behavior by colleagues or supervisors." Therefore, argues Tate, the fact that he went to Burban and broke off their relationship constituted protected activity. The parties do not dispute that he was terminated immediately, which would mean that he establishes the second element of a *prima facie* case (adverse employment action). As for the third element, that of a causal link between the protected activity and the adverse employment action, the parties do not spend any time debating the point. That is likely because, if it is determined that Tate's words and conduct constitute protected activity, the fact that he was fired immediately is sufficient to establish at least an inference of a causal link. *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 603 (7th Cir. 2001) (citing *Sweeney v. West*, 149 F.3d 550, 557 (7th Cir. 1998)). As a result of the foregoing, the viability of Tate's retaliation claim rests on whether his act of ending his relationship with Burban constitutes protected activity. On that point, the parties acknowledge that there is a split of authority among the courts that have addressed this issue. EMS readily admits this in its briefing. *See* Brief in Support, Docket at 34, pp. 12-14 (recognizing that "courts have split on the issue[.]"). Likewise, Tate "notes the division of authority among district courts as to whether rebuffing an advance can qualify as protected activity for purposes of a retaliation claim." Brief in Opposition, Docket at 39, p. 15.

As mentioned above, Tate claims that the facts surrounding his alleged "protected activity" are as follows: On the day that he was fired, Burban "called

[him] into the office and asked him if he had made a decision (about whether to continue the sexual relationship with Burban). . . . Tate told Burban his decision, 'That I wasn't messin' with her anymore.' . . . Burban immediately started screaming that she was 'gonna show' Tate, that he could leave, . . . and 'You're gonna lose your job." Brief in Opposition, Docket at 39, p. 7 (citing portions of Tate's deposition). Tate concludes that he "was fired by the sexual harasser immediately after deciding to refuse her sexual demands." *Id.*, p. 13.

EMS counters that, even accepting Tate's version of that discussion as true, "Ms. Burban was not making, and therefore Mr. Tate was not rebuffing, a sexual demand or advance. He was simply calling off their consensual affair and in so doing indicating that he would not be open to any future sexual advances from Ms. Burban. Because consensual sexual relationships are not against the law, ending such a relationship cannot be considered opposing unlawful behavior for Title VII retaliation purposes." Reply Brief in Support, Docket at 46, p. 3.

It is true, as EMS contends, that the evidence does not demonstrate that Burban was making a "sexual advance" on the day she and Tate had this discussion (or argument, as the case may be). But that is probably a distinction without a difference, at least with regard to the present motion for summary judgment. The facts before the court are that Tate went to Burban's office; she was his supervisor; she asked Tate whether he intended to continue their sexual relationship; Tate told her that he was ending that relationship; Burban became angry and/or upset; and Tate was fired from his job. Thus, the fact that Burban was not, at that

precise moment, making any sexual advances towards Tate is not determinative of the issue of whether his words constituted protected activity.

Again, both parties concede that the Seventh Circuit Court of Appeals has not ruled on the issue of whether a plaintiff who rebuffs a supervisor's sexual advance has engaged in protected activity for purposes of bringing a retaliation claim. In *Murray v. Chicago Transit Authority*, 252 F.3d 880 (7th Cir. 2001), the appellate court stated flatly that "we are able to find no Seventh Circuit precedent . . . supporting the premise that rejection of a sexual advance can serve as a statutorily protected activity for purposes of establishing a Title VII retaliation claim." *Murray*, 252 F.3d at 890. The court went on to note that its examination of district court cases addressing the issue revealed a "division of authority . . . ." *Id.*, fn. 2. However, the court did not rule on the issue, since it held that the plaintiff in that case failed to establish a *prima facie* case of retaliation for other reasons. At least one district court has noted that *none* of the circuit courts of appeal have ruled directly on this issue. *See Wagner v. Burnham*, 2006 WL 266551 (N.D.N.Y.) *17. In the *Roberts* decision, the district judge included in his order a lengthy citation list to district and appellate court cases on both sides of this issue. *Id.* at * 4. Tate cites to, and quotes extensively from, this district court opinion. Naturally, the holding in *Roberts* supports Tate's position. The court in *Roberts*, as well as the many courts that have issued holdings consistent with Tate's position, have done so based on the language of Title VII itself. As Judge Kennelly wrote in *Roberts*: "The court agrees with those district judges who have found that refusing sexual advances is protected activity under Title VII.

Title VII makes it unlawful 'for an employer to discriminate against any of his employees . . . because *he has opposed any practice made an unlawful employment practice by this subchapter*, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.'" *Id.* (italics in original). Therefore, the court concluded, since sexual harassment in any form is clearly a "practice made unlawful" by Title VII, an employee who refuses a supervisor's sexual advances is engaging in "protected activity" as that term is used in the statute. *Id.*

There is a factual distinction between the *Roberts* case and the case at bar. In *Roberts*, the plaintiff apparently "repeatedly resisted [her supervisor's] sexually harassing behavior . . . ." *Id.* In this case, the evidence is that Tate only "protested" the alleged harassment he was experiencing on the single occasion when he went to Burban's office and informed her that he no longer intended to continue their relationship. And again, as EMS argues, Burban was not, at that particular moment, making any sexual advances toward Tate. So the question becomes, does this single episode constitute "protected activity" as that phrase is contemplated by statute?

The facts before the court indicate that Tate decided to end his sexual relationship with Burban, his supervisor (or, as EMS claims, his *alleged* relationship). When he did so, he was fired virtually immediately. Viewing the evidence in a light most favorable to Tate, it cannot be said that his retaliation claims fails as a matter of law. Clearly, a jury may view this whole case in a very different way. But that is neither here nor there for purposes of the present

motion for summary judgment. It is reasonable to infer from the facts as they are presented that Tate's action of breaking off his relationship with Burban was "protected activity" and, accordingly, comports closely enough with the language of Title VII that he should not have suffered the loss of his job for having done so.[4] Again, according to Tate, he was attempting to break off a relationship, for whatever reason, with his direct supervisor. After confronting her directly and doing so, he was terminated.

Tate's retaliation claim (as well as his sexual harassment claim) turns largely on the true nature of the relationship between him and Burban and their respective states of mind on the day Tate was fired. But those are factual issues that cannot be resolved until a jury hears Tate's testimony (and, presumably Burban's) and is able to make credibility

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[4] EMS also argues that if any relationship really did exist between Tate and Burban, it was completely consensual and therefore not violative of Title VII. *See* Brief in Support, Docket at 34, p. 11. However, Tate counters that even a workplace relationship of this sort which begins as consensual does not preclude a sexual harassment claim if the employee later attempts to end the relationship and suffers an adverse employment action. *See* Brief in Opposition, Docket at 39, pp. 13-14. Both positions are legally correct. However, as stated above, Tate's sexual harassment claim is not being challenged in the present motion. Nonetheless, EMS takes the position that if the relationship was entirely consensual, then Tate would be unable to pursue a retaliation claim because when he broke off his relationship with Burban he was not attempting to end any unwelcome sexual advances on her part. But Tate maintains that the relationship did in fact become unwelcome or unwanted, which is why he decided to end it. By his reasoning, he was "refusing" sexual advances by Burban when he did so and suffered the ultimate adverse employment action as a result.

determinations. For purposes of the present motion for summary judgment, Tate has established a genuine issue of fact with regard to his claim of retaliation and EMS is not entitled to judgment in its favor on that claim at this point in the proceedings.

CONCLUSION

For the reasons discussed herein, the Motion for Summary Judgment filed by Defendant Executive Management Services, Inc., is DENIED.

Date: May 12, 2006.

/s/ William C. Lee
William C. Lee, Judge
U.S. District Court
Northern District of Indiana